

BEFORE THE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Late Protest
Under the Sales and Use Tax Law of:

Action Medical Products, Inc.
Account: SR FH 97-309543
Case ID: 57424

Appearances:

For Petitioner: Jacqueline Reynolds, President

For Sales and Use Tax Department: David Levine, Tax Counsel IV

For Appeals Section: John Abbott, Tax Counsel IV

MEMORANDUM OPINION

This opinion considers the merits of a late protest for the period May 10, 1991, through December 31, 1998. At the Board hearing, taxpayer protested a determination measured by \$865,982 for leases of certain types of continuous passive motion machines, leased in the same form as acquired and purchased ex-tax from out-of-state vendors. A physician must order the use of these machines. Patients use the machines for the treatment of injuries and, post-operatively, to deter stiffness and loss of range of motion in joints such as knees and hips. The affected limbs of these patients are strapped into the machines. Powered by electricity, the machines move the affected joints through a controlled range of motion. The taxpayer contended that these continuous passive motion machines qualify as medicines, specifically, orthotic devices exempt under Revenue and Taxation Code section 6369, subdivision (c)(3)(A). If so, the leases are exempt from tax.

The Sales and Use Tax Department contended that, while the machines met all other requirements of a medicine as defined in California Code of Regulations, title 18, section 1591, the machines were orthotic devices that patients did not fully wear on their bodies. Instead, the machines' support stands rested on the floor. The Department contended that it has long been Board policy that, in order to qualify as a medicine, orthotic devices must be fully worn on the body. By amendments to subdivision (b)(4) of section 1591, effective March 10, 2000 and applicable retroactively, the Board clarified that "If any part of the orthotic device is not worn on the person, the device is not a medicine for the purposes of this regulation." However, the Department allowed the medicine exemption for taxpayer's leases of continuous passive motion machines that served the identical medical rehabilitation purpose for other joints, such as elbow and shoulder joints, but were fully worn on the body.

OPINION

Revenue and Taxation Code section 6369 provides in relevant part:

“(c)... ‘medicines,’ as used in this section means and includes any of the following:

¶...¶

(3)(A) Orthotic devices... designed to be worn on the person of the user as a brace, support, or correction for the body structure....”

Some continuous passive motion machines leased by the taxpayer were exempt, but others were classified as taxable, even though all the machines served the identical medical rehabilitation purpose. We conclude that the continuous passive motion machines at issue in this case qualify as orthotic devices pursuant to section 6369, subdivision (c)(3)(A), although they were not fully worn on the body. Grant the late protest with respect to the disputed transactions.

Adopted at Sacramento, California, on April 18, 2002.

Dean F. Andal _____, Member

Claude Parrish _____, Member

Marcy Jo Mandel* _____, Member

*For Dr. Kathleen Connell, pursuant to Government Code section 7.9.